No. 3318.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

Ricardo Flores Magon and
Librado Rivera,
Plaintiffs in Error,
v.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE

The Plaintiffs in Error herein, hereinafter designated as the defendants, were indicted in the United States District Court, Southern District of California, Southern Division on April 19th, 1918. They were charged in six counts with six distinct offenses, to-wit, in the first count, with conspiracy under Section 37 of the Federal Penal Code of 1910; in the third count with the violation of Section 3 of the Act of June 15th, 1917; that is to say, with the publication of false statements tending to interfere with the success of the military and naval forces of the United States, and causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States; in the fourth count with the violation of Section 3, Title

XII, Act of June 15th, 1917, that is with using the mails for the transmission of non-mailable matter; and in the fifth count with the violation of Section 19, Act of October 6th, 1917; that is to say, with the printing in a foreign language matter respecting Government policies, etc., without having filed a translation with the Postmaster; and in the sixth count with the violation of Section 211 of the Penal Code of 1910; that is to say with the mailing of indecent matter. The demurrer to the second count of the indictment was sustained and the defendants proceeded to trial upon the other five counts of the indictment.

Upon argument of the demurrer the defendants contended that the indictment is duplicitous in this, that several distinct offenses against several separate statutes are charged, and attempted to be charged in one indictment, and that said five offenses so charged are shown upon the face of the indictment to be one and the same continuous act of the defendants, inspired by the same criminal intent, and that the essential and indispensable element of each of said five offenses is one and the same criminal intent, and that the gravaman of each of the five offenses charged against the defendants in the first, the third, the fourth, the fifth and the sixth count of the indictment is the same for each, but that the essential element of each of the five offenses charged against the defendants in said five counts of the indictment was the same act in each of said five counts, to-wit: the composing, printing and publishing of the Manifesto so-called, set out in the first

count of the indictment; that it is a fundamental rule of law that out of the same facts a series of charges cannot be preferred against the defendants; that the Government cannot split up one crime and prosecute it in parts by separate counts in the same indictment, for the reason that each of said five counts in the indictment is in effect a separate indictment, requiring evidence of a different character to justify conviction, and punishable differently; that the Government cannot split up one crime and prosecute it in several parts under several counts in the same indictment, nor can the defendants be convicted and punished for five different and distinct crimes growing out of the same identical act, to-wit: the issuance of the Manifesto so-called, set out in the first count of the indictment; because the gist of the offense charged in the third count of the indictment against the defendants is wilfully causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces of the United States, and this offense cannot be charged in the same indictment with the offense attempted to be charged in either the first, fourth, fifth, or the sixth count of the said indictment; because the gist of the offense attempted to be charged in the fourth count of the indictment against the defendants, is unlawfully using or attempting to use the United States mails for the transmission of non-mailable matter, to-wit: a newspaper containing a copy of the Manifesto, so-called, set out in the first count of the indictment, and this offense cannot be joined in the same indictment with the

offenses attempted to be charged against the defendants in either the first or the third, or the fifth, or the sixth count of the said indictment; because the gist of the offense attempted to be charged against the defendants in the fifth count of the indictment is unlawfully printing, and publishing and circulating the aforesaid Manifesto set out in the first count of the indictment, in the Spanish language without having first filed with the Postmaster of Los Angeles, California, the translation thereof, as required by law, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth, or the sixth counts of the said indictment; because the gist of the offense attempted to be charged in the sixth count of the indictment is unlawfully depositing in the Post-office a newspaper containing the Manifesto, so-called, set out in the first count of the indictment, in violation of Section 211 of the Penal Code, and this offense cannot be joined in the same indictment with the offenses attempted to be charged against the defendants in either the first, or the third, or the fourth, or the fifth count of the said indictment; because the Government cannot by giving different names to the same thing done or by prosecuting the defendants under different statutes, multiply offenses out of one and the same thing done by the accused, to-wit: the issuance of the Manifesto, so-called, set out in the first count of the indictment; because although the offenses charged against the defendants in the five counts of the in-

dictment are different in name, they are in fact the same and grow out of only one transaction, to-wit: the Manifesto, so-called, set out in the first count of the indictment.

The demurrer was overruled as to the first, third, fourth, fifth and sixth counts, and at the close of the trial the jury found the defendants and each of them guilty on each of said counts, and thereafter they were sentenced to a long term of imprisonment in the penitentiary at MacNeil's Island and to pay a heavy fine.

ARGUMENT.

The defendants have contended from the beginning that the facts stated in each of the five counts of the indictment upon which they were tried, do not constitute an offense against the United States. Upon this point the defendants will submit no authorities, for the reason that no precedents exactly in point are obtainable, and the Court must, therefore, for itself determine whether or not the contention is sound.

The gist of the allegations in these counts is that the article complained of, upon which the prosecution is based, contained false reports and false statements which would tend to interfere with the operation of the military and naval forces of the United States, and would tend to promote the success of the enemies of the United States, and would tend to cause insubordination, disloyalty; mutiny and refusal of duty in the military and naval forces of the United States, and would obstruct the recruiting service of the United States. This matter, it is

obvious, must be left to the judgment of the Court, and authorities if they could be found would aid but little in determining this question. We respectfully submit, however, that the so-called Manifesto contains no false reports and no false statements, having the tendency as alleged in the indictment, and that in fact there are no such things as false reports or false statements in the Manifesto. The matters as therein set forth are mere matters of opinion, and it has frequently been held by the District Courts of the United States in their separate jurisdictions that mere matters of opinion are not within the contemplation of the statute, and certainly it is unnecessary to argue that if the statements made in the Manifesto are expressions of opinion, they are not false reports or false statements within the purview of the several statutes which it is alleged in the indictment have been infringed. An inspection of the demurrer will disclose to the Court that those portions of the Manifesto relied upon by the prosecution are not in any sense of the word either false reports or false statements.

The next point to which we wish to call the Court's attention is the duplicitous character of the indictment. It was said in an early New York case, in which the most distinguished lawyers of New York were counsel "that the rule permitting the trial of a person for several offenses at the same time is not authoritatively established, and that it ought not to be. It has not been the practice to allow two distinct offenses to be tried at the same time, either

by indictment or final action. Besides the confusion and embarrassment in which a trial at one time for many offenses would involve the accused, such a practice, if tolerated, would break down and utterly obliterate many principles of law that are very well established and essential to the safety of the citizens."

People v. Liscomb, 60 N. Y. 550.

The Government cannot split up one crime and prosecute it in several parts, nor can a defendant be convicted and punished for two distinct crimes growing out of the same indentical act. The law does not permit a single individual act to be divided so as to make out of it two distinct indictable offenses.

People v. Stephens, 79 Cal. 428.

It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred.

Regina v. Erlington, 9 Cox C. C. 86.

To give our constitutional provision the force evidently meant, and to render it effective, the same offense must be interpreted as equivalent to the same criminal act.

1 Bishop's Crim. L. 1060.

The State cannot split up one crime and prosecute it in parts.

Jackson v. State, 14 Ind. 327;

State v. Laws, 2 Hawks, 98, 11 A.D. 441;

State v. Cooper, 13 N.J.L. 361, 25 A.D. 490;

Fisher v. Commonwealth, 1 Bush 211; 89 A.D. 620;

Drake v. State, 60 Ala. 43.

Separate offenses which are committed at the same time and are parts of a continuous criminal act inspired by the same criminal intent, which is an essential element of each offense are but one crime.

Stevens v. McClaughry, 207 F. 18, 51 L. R. N. 390.

In a celebrated case the following language was used by Chief Justice Waite, and we think the principle enunciated therein is sound: "Whenever in any criminal transaction a felonious intent is essential to render it a crime, without proof of which no conviction can be had, two informations, founded upon the same intent cannot be maintained."

Munson v. McClaughry, 198 F. 72, 42 L. R. N. 302, 303.

Logan v. U. S., 123 F. 291;

U. S. v. Miner, 26 F. Cases, No. 15780.

"If an indictment contains different counts which are in fact for seperate and distinct offenses, and this fact appears on the opening of the cause, or at any time before the jury are sworn for the trial thereof, the Court may quash the same lest it may confound the prisoner in his defense, or prejudice his challenge of the jury."

State v. Shores (W. Va.), 13 A.S.R. 875;

State v. Bell, 92 A.D. 661, 665. Note.

"True rule as to joinder of counts in information or indictment is, if the different counts are drawn and used with a view to one and the same transaction, so that one of them, upon the trial, may be found to meet the evidence, the court will not interfere with the proceeding, as such an object is a legit-

imate one; but where the object, purpose, and effect is to prosecute the defendant for separate felonies by one information, or indictment, the court will not permit it to be done, as the injustice and prejudice to the accused overbalance all possible benefits to be derived to the public from such a practice."

People v. Aikin (Mich.) 11 A.S.R. 512.

The eighth assignment of error relates to the introduction in evidence over the objection of the defendants of a certain speech made by defendent Ricardo Flores Magon on May 27th, 1917, and published in his paper, Regeneracion, under date of July 28th, 1917. Defendants contend that the introduction of this evidence is prejudicial error, for the reason that same was incompetent, irrelevant and immaterial, and the defendant Librado Rivera especially objected on the ground that he ought not to be bound in any wise by what was said by his co-defendant in a public speech on May 27th, 1917, and afterwards reprinted in Spanish in a paper over which he had no control.

The ninth assignment of error relates to the introduction of evidence over the objection of the defendants of a letter from Emma Goldman under date of February 6th, 1918, which was afterwards printed in the newspaper belonging to the defendant Ricardo Flores Magon under date of March 16th, 1918, on the ground that said evidence introduced by the Government against the defendants was incompetent, immaterial and irrelevant and tended only to the prejudice of the defendants and each of them. At the time of the trial of this case the intro-

duction of any communication from Emma Goldman to the defendants indicating or tending to indicate a friendly relationship between the said Emma Goldman and the defendants could not be other than highly prejudicial. The defendants respectfully submit that this evidence ought not to be admitted into the case against them, and that its introduction was prejudicial error, for which this cause ought to be reversed.

People v. Colburn, 105 Cal. 648, 38 P. 1105;
People v. Fitzgerald, 156 N.Y. 253, 50 N.E. 846;
Willett v. People, 27 Hun (N.Y.) 469;
People v. Luke, 9 N.Y. St. 638;
People v. Green, 1 Park, Cr. (N.Y.) 11;
Packer v. U. S., 106 Fed. 906, 46 C.C.A. 35.

Respectfully submitted,

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